APPEAL NO. 021774
FILED AUGUST 15, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on June 24, 2002. The hearing officer determined that the appellant, Texas Mutual Insurance Company (carrier 1), is liable for the _____, compensable injury sustained by respondent 1 (claimant); and that the claimant had disability from _____ through December 19, 2001. Carrier 1 appeals, asserting that the hearing officer erred in holding carrier 1 liable for the claimant's injuries. Respondent 2, American Home Assurance Company (carrier 2), responded, agreeing that the hearing officer correctly determined that carrier 2 was not the proper carrier for the claimant's injury, but taking no position on the correctness of the hearing officer's determination as to carrier 1. The claimant did not respond to either the appeal or the response.

DECISION

Reversed and rendered in part; affirmed in part.

The claimant in this case worked for (employer) as a senior records clerk. Carrier 2 is the workers' compensation insurance carrier for the employer. In addition, the claimant was elected to a three-year term as a vice-president of the (union), and had served approximately two years of the term at the time of her injury. Carrier 1 is the workers' compensation insurance carrier for the union. Under the collective bargaining agreement, the claimant was paid by the employer for work deemed to be related to company business, and the union makes up any wages (up to a 40-hour week) that are not paid by the employer. In reality, all of the claimant's work is related to her position in the union (either as it relates to the employer's business or strictly on behalf of the union), and she no longer performs the type of work which she used to perform for the employer. She still has an office in the employer's building, but does not work there, only stopping by twice a week to pick up any mail. She has an office in the union hall across the street, and does her work there or at other locations as designated by the employer or by the union president. In calendar year 2001, slightly more than half of the claimant's wages were paid by the employer, and the rest were paid by the union. All of the claimant's employment benefits come from the employer.

On _____, at the behest of the employer, the claimant spent the day at a location away from the employer's building and the union hall, attending seminars put on by the employer to provide information to employees potentially subject to layoff. After the seminars ended for the day, the claimant returned to her office in the union hall to drop off information accumulated during the day, and to meet other union officials to go to an AFL-CIO meeting/Christmas function, which she was expected to attend. The claimant dropped off items at her office and was about to leave the building when she realized that she did not have her day planner, and needed it for the next day's activities, which included more seminars at the remote location. As she was returning

to her office, the claimant slipped and fell on a plastic mat in the lobby of the union hall, sustaining the injuries that caused her to miss work from _____ through December 19, 2001.

The question of which carrier is liable for the claimant's injuries is ultimately a question of fact for the hearing officer, as fact finder, to resolve. As the fact finder, the hearing officer was charged with the responsibility for resolving the conflicts in the evidence. Texas Employers' Ins. Ass'n v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). To that end, the hearing officer could believe all, part, or none of the testimony of any witness and could properly decide what weight he would assign to the other evidence before him. Campos, *supra*. The question of liability in this case depends on whose employee the claimant was at the time she was injured. Section 401.012(a) defines "employee" as "each person in the service of another under a contract of hire, whether express or implied, or oral or written." Under subsection (b)(1), the term "employee" includes "an employee employed in the usual course and scope of the employer's business who is directed by the employer temporarily to perform services outside the usual course and scope of the employer's business." Under the circumstances of this case, we conclude that the hearing officer's determination that the claimant was not working for the employer at the time of her injury, but rather was an employee of the union at that time, performing services under the direction of the management of the union, is against the great weight and preponderance of the evidence. The claimant had been an employee of the employer for about 24 years. For calendar year 2001, more than half of her wages and all of her benefits were provided by the employer. The employer recognized the value of having a union representative present in various situations and paid the claimant for work that was deemed to be in furtherance of the employer's business. With regard to the union, the claimant was elected to a vice-president position in her local union, not hired to provide services. On _____, adding together her travel time and time at the seminar location, the claimant had worked eight hours for the employer, and was paid for eight hours work by the employer. At the end of the day, she could have gone straight to her home and returned to the seminar location the next day. However, the claimant had materials related to the day's work that she chose to take to her office in the union hall. That action was clearly related to her work for the employer that day and furthered the interests of the employer. When the claimant turned back to retrieve her day planner, it was because she needed it for the next day, when she was scheduled to be at the seminar location for a portion of the day, again to further the affairs of the employer. The hearing officer's finding that the claimant was not furthering the affairs of the employer at the time of the injury is against the great weight and preponderance of the evidence. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

As to carrier 2's argument that our decisions in Texas Workers' Compensation Commission Appeal No. 991158, decided July 15, 1999, and Texas Workers' Compensation Commission Appeal No. 971607, decided September 30, 1997, are applicable in this instance, we disagree because there was a furthering of the employer's interest. Carrier 2 also cites cases applying the access doctrine, urging that

since the employer did not control the premises where the claimant was injured, there can be no liability for the employer. That position ignores the fact that the employer knew that the claimant had an office in the union hall, and routinely worked at that location and at other locations to which she was directed by the employer. Given the nature of her work with the union, and the fact that it benefited the employer, whether performed at the union hall, at the employer's building, or at other locations, it is disingenuous to argue that an injury sustained by the claimant at a location other than the employer's building would not be covered for that reason.

Carrier 1 argues that its workers' compensation policy with the union specifically excludes the claimant, by name, in the "Partners, Officers and Others Exclusion Endorsement." Carrier 1's Exhibit C. The policy was written to cover the two full-time clerical personnel employed by the union, and specifically excludes those elected officers of the union who must be employees of another employer to even continue to hold their union positions. Although not specifically articulated by the hearing officer, it is apparent that he considered the doctrine of "dual capacity" to be applicable in this case. He states that "[w]hether or not the union lists her as an employee on its schedule filed with [carrier 1] does not control her status," indicating his belief that the claimant was acting as an employee of the union when she was injured, rather than serving only in a union officer capacity at that time. However, the liability for the claimant's injury lies with carrier 2 because the claimant was injured while furthering the interests of the employer.

The evidence is sufficient to support the determination that the claimant had disability from _____ through December 19, 2001. Cain, *supra*; King, *supra*.

We reverse the decision and order of the hearing officer that carrier 1 is liable for the claimant's injuries sustained on _____, and render a new decision that carrier 2 is liable for the claimant's compensable injury on _____. The decision and order of the hearing officer that the claimant had disability from _____ through December 19, 2001, is affirmed.

The true corporate name of insurance carrier 1 is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

MR. RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.

The true corporate name of insurance carrier 2 is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Michael B. McShane
Appeals Judge

CONCUR:

_____
Philip F. O'Neill
Appeals Judge

_____
Robert W. Potts
Appeals Judge